STATE OF MICHIGAN
IN THE COURT OF APPEALS

JENNIFER L. HUDOCK and
BRIAN HUDOCK

Plaintiffs-Appellees

vs.

Supreme Court No. 126859
Court of Appeals No. 245934
Lower Court No. 00-1912 CE

EDWARD SCHULACK, HOBBS + BLACK,
INC. a Michigan Corp.,

Defendant-Appellant.
_____/

APPELLEE'S BRIEF

DONNELLY W. HADDEN, P.C.
By: Donnelly W. Hadden. (P14507)
Attorney for Appellees
2395 S. Huron Parkway, #200
Ann Arbor, MI 48104-5129
(734) 477-7744

BALL & BALL, LLP
By: Bettie K. Ball (P49431)
Co-Counsel for Appellees
20 S. Main St., Suite 115
Mt. Clemens, MI 48043-2370
(586) 468-9850

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COUNTER-STATEMENT OF ORDER APPEALED FROM

Defendant-Appellant seeks leave to appeal from an opinion of the Court of Appeals which literally applied the legislature's express language in MCL 600.5839(1) and MCL 600.5805(14). This opinion reversed a summary disposition by the Macomb County Circuit Court which held that plaintiffs' cause of action was barred by a two-year statute of limitations as to defendant-appellant Edward Schulak Hobbs + Black, Inc., an architectural firm. This defendant was one of several defendants in this civil case brought by these appellees and two other plaintiffs, Ellen Ostroth and Thane Ostroth. Several defendants brought motions for summary disposition, some of which were granted and others denied. This appellant brought a motion for summary disposition under MCR 2.116(6) which was granted. It was not a final order disposing of all claims against all parties nor closing the case. The case continued as to the other defendants.

On December 16th, 2002, when the last of the remaining defendants were dismissed and a final order was entered plaintiffs' claims against the appellant became ripe for appeal. Mr. & Mrs. Hudock then filed their Claim of Appeal. Dr. & Mrs. Ostroth chose not to claim an appeal and are not parties to this appeal. Therefore all the documents included in the Appendices related to the Ostroths are immaterial. On July 8th,

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2004 the Court of Appeals entered its opinion reversing the circuit court and remanding the case. This court granted appellant's application for leave to appeal.

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COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. WHETHER THIS APPEAL IS MOOT BECAUSE, AS A MATTER OF LAW, APPELLEE'S FILED THEIR CASE WITHIN TWO YEARS AFTER THEIR CAUSE OF ACTION ACCRUED.

Appellees say, "yes."
Appellants would say, "no."
The trial court did not address this issue.
The Court of Appeals ruled this issue was moot.

II. WHETHER THE SIX-YEAR STATUTE OF LIMITATIONS OF MCL 600.5839 PRECLUDES APPLICATION OF THE STATUTES OF LIMITATION PRESCRIBED BY MCL 600.5805(6) and (10)

Appellees say, "yes."
Appellant says, "no."
The trial court ruled, "no."
The Court of Appeals held, "yes."

III. WHETHER, IF NOT, THE TWO-YEAR MALPRACTICE STATUTE, MCL 600.5805(6) RATHER THAN THE THREE-YEAR GENERAL STATUTE, MCL 600.5805(10) IS APPLICABLE.

Appellant says, "yes."
Appellees say, "no."
The Trial Judge ruled, "yes."
The Court of Appeals did not address this issue.

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COUNTER-STATEMENT OF FACTS

[References are to pages in the appendices as indicated]

Appellee Jennifer Hudock was employed by the advertizing firm of Campbell Ewald, which, on April 24th, 1998 moved her job station into a building owned by Warren Regency at 12220 13 Mile Road, Warren, Michigan. [117a] The building was still under renovation when she started working there. [236a, 552a] She began to be sick due to poor ventilation and fumes in her workplace. [237a, 241a, 242a] A number of individuals reportedly developed symptoms associated with their occupancy of the building. [567a] On August 14th, 1998 she was advised by her physician, after a series of tests, to quit her job and thus end the exposure. [242a - 246a] This she did, her last day there was August 17th, 1998. [117a]

As of that date, the improvements were still underway and the building, although partially occupied, had not, even as of September 16th, 1998, received approved Certification of Occupancies from the City of Warren. [554a]

On May 10th, 2000 Mrs. Hudock and Ellen Ostroth (who had an office close to appellee's work station) filed this case in the Circuit Court for Macomb County, with their husbands joining to assert their loss of consortium claims. [Complaint, 3b] They initially sued the building owners, the general contractor and two subcontractors. [2b] This was 1 year and 9

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months after Mrs. Hudock's last exposure to toxins on the job.

On August 7th, 2000, 28 days after it filed its Answer, defendant Denny's Heating Cooling and Refrigeration Services, Inc., filed a Notice of Non-Party Fault pursuant to MCR 2.112(K) naming, among others, appellant Edward Schulak, Hobbs + Black, Inc. as a non-party at fault. [15b, 16b] Appellees filed a Motion to strike that Notice of Non-Party Fault on September 27th, 2000, 51 days after the Notice was filed.[19b] The Motion also requested leave to add the purported non-parties at fault.[20b]

On October 16th, 2000 the trial Judge ordered that appellees could add the appellant as a defendant and file and amended complaint against it.[26b] It denied the motion to strike the Notice of Non-Party Fault.

On November 10th, 2000 appellees filed their First Amended Complaint, stating a cause of action against appellant and re-stating their causes of action against the other defendants.[27b]

On September 6th, 2001 appellant filed a Motion for Summary Disposition in which it alleged, among other things, that plaintiffs' claims were barred by the statute of limitations. [31a] Appellees in their answer to that motion pointed out that the defense had not been pleaded and was therefore waived.[412a] Appellant thereupon moved for leave to

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file still another Answer in which it could plead that defense and the court, over vigorous objections of appellees' counsel, granted leave to amend. [632a] [641a]

Meanwhile, by anticipation, appellant architect had filed Amended Affirmative Defenses in which it alleged the statute of limitations defense [42b] and then renewed its motion for summary disposition under MCR 2.116(7) on November 19th, 2001.

Plaintiffs, on November 30th, 2001 filed an Answer and Rebuttal to that motion as a supplemental response addressing the merits of the motion [49b] The trial court granted the motion in a written Opinion and Order entered March 4th, 2002. [656a]

Because there were other claims against other parties still pending, that Order was not a final order. After all the other parties had been dismissed and a final order was entered, plaintiffs Jennifer L. Hudock and Brian Hudock claimed an appeal to the Court of Appeals. [667a] Ellen and Thane Ostroth did not appeal. That court, On July 8th, 2004 published its opinion from which leave to appeal was granted. [672a]

On June 7th, 2004 appellees moved the Court of Appeals for leave to permit amendment or additions to the grounds for appeal, citing the relation-back to original date of filing provisions of MCL 600.2957(2). [57b] This motion was denied as moot on July 9th, 2004 [63b] the day after the opinion was

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published holding that a six-year statute applies.

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ARGUMENT

I

THIS APPEAL IS MOOT BECAUSE, AS A MATTER OF LAW, APPELLEES' FILED THEIR CASE WITHIN THE TWO-YEAR MALPRACTICE STATUTE EVEN IF IT APPLIES.

A. Standard of Review

The standard of review for this issue is *de novo.* Appellees' case was dismissed upon a finding of fact and law that it was barred by a statute of limitations upon appellant's motion under MCR 2.116(C)(7). The standard for review of a dismissal for that reason is that the trial court was required to accept all well-pleaded allegations as true and construe them in the light most favorable to the plaintiffs, *Stabelein v Schuster*, 183 Mich App 477, 455 NW2d 315 (1990). The defense of statute of limitations is an affirmative defense and the burden of pleading and proof of the bar of limitations is upon the defendant. *Travelers Insurance Co. v. Detroit Edison Co.*, 237 Mich App 485, 603 NW2d 317 (1999). Therefore if there was any question whatsoever that plaintiffs' claims are not barred, the motion should have been denied.

B. Appellees' lawsuit against appellant relates back as a matter of law, to a filing date well within even the two-year statute of limitations.

Appellant was sued, as a matter of law, about 1 year and 9 months after appellee's cause of action accrued, by virtue of MCL 600.2957(2). Therefore even if a two-year malpractice

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period of limitations is applied, appellees complied.

Mrs. Hudock was sickened by a continuing exposure to, among other things, formaldehyde, [527a] at her work over a period of several months in 1998 culminating on August 17th, 1998. In cases of repeating or continuous torts this court has held that the plaintiff's cause of action accrues, and the period of limitations begins, on the date of the last exposure. *Traver Lakes Community Maintenance Association v. The Douglas Co.*, 224 Mich App 335, 586 NW2d 847 (1996) In *Garg v. Macomb County Community Mental Health Services*, 472 Mich 263, 696 NW2d 646 (2005) it was held that a plaintiff who alleges a continuing tort can collect those damages that accrued within the applicable period of limitations before she files her case.

Mrs. and Mr. Hudock filed their Complaint 21 months after her last exposure, but did not name appellant as a defendant. They became aware of the potential liability of appellant when another defendant (Denny's Heating, Cooling and Refrigeration, Inc.) named appellant as a Non-Party at Fault as provided by the Tort Reform Act and MCR 2.112(K)(3). This was done within the 91-day window after Denny's Answer was filed. Appellees moved to strike the notice or for leave to add the non-parties as defendants, which is allowed under MCR 2.112(K)(3)(d). The motion to strike was denied, but the trial court granted leave to add appellant as a defendant and this was promptly done. All

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this was done within the time limits specified by the Rule.

The statute, MCL 600.2957(2) provides that when a new defendant is added by virtue of having been named a non-party at fault;

> A cause of action added under this subsection is not barred by a period of limitations unless the cause of action would have been barred by a period of limitation at the time of the filing of the original action.

Under this statute the filing of the First Amended Complaint against appellant relates back to the filing of the original Complaint on May 10th, 2000. Even if appellant prevails in convincing this court that a two-year statute of limitations should apply to cases like this, in this particular case this appellee is still entitled to a reversal of the summary disposition. Appellee's filing was within 2 years of when her claim accrued, and was even *before* she knew of or should have discovered the existence of her claim. She was entitled to 6 months after she knew or should have discovered the existence of her claim against the architect, under MCL 600.5838(2). She learned of the culpability of the architect when Denny's filed its Notice of Non-Party at Fault on August 7th, 2000. She then had until February 7th, 2002 to file lawsuit against appellant. By virtue of the relation-back statute it was already filed on May 10th, 2000.

Looking at this whole case *de novo*, as this court must do,

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it is clear that appellees' case was erroneously dismissed even under appellant's best-case scenario. Whether there should be a six-year, three-year or two-year statute of limitations applicable to architects is a moot question in the context of this particular case. Whatever is decided on those questions will be, essentially, mere dicta.

But since the court has directed the parties to address those issues, appellees will do so.

II

THE SIX-YEAR STATUTE OF LIMITATIONS OF MCL 600.5839(1) PRECLUDES APPLICATION OF THE STATUTES OF LIMITATION PRESCRIBED BY MCL 600.5805(6) or (10)

A. Standard of Review

Appellees agree with appellants that the standard of review is *de novo*.

B. The Legislature has clearly expressed its intent that the six-year period of limitations in MCL 600.5839 applies to all cases against architects.

Limitations of Actions are provided for in Chapter 58 of the Revised Judicature Act, Limitation of Actions in all suits at law are thereby controlled. That chapter details the operative sections applied by the Court of Appeals. The first of these is MCL 600.5839(1):

> Actions for injury or death arising from unsafe or defective improvements to real property; time limits for actions; conditions for action.

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> Sec. 5839. (1) No person may maintain any action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of such injury, against any state licensed architect or professional engineer performing or furnishing the design or supervision of construction of the improvement, or against any contractor making the improvement, more than 6 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement, or 1 year after the defect is discovered or should have been discovered, provided that the defect constitutes the proximate cause of the injury or damage for which the action is brought and is the result of gross negligence on the part of the contractor or licensed architect or professional engineer. However, no such action shall be maintained more than 10 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement.

As originally enacted in 1967 this section did not contain the 1-year after discovery of gross negligence clause nor the 10-year absolute limitation clause. In its earlier state this court held, in *O'Brien v. Hazelet & Erdal*, 410 Mich 1, 299 NW2d 336 (1980), that the statute was both a statute of limitation and a statute of repose. 410 Mich 1 @ 115. Thereafter the legislature clarified this by amendment, 1985 PA 188, adding the new clauses. This makes it clear that the legislature intended that there be a 6-year limitation of actions, with a 10-year statute of repose, and a 1-year after discovery clause in the event of gross negligence.

If that were not enough, the legislature later removed architects from the standard malpractice statute of

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limitations, MCL 600.5805(6), by providing a special subsection, MCL 600.5805(14);

> The period of limitations for an action against a state licensed architect, professional engineer, land surveyor or contractor based upon improvement to real property shall be as provided in section 5839.

It is difficult to conceive of how the legislature could have made its intent more obvious. In cases involving improvements to real property, architects are **not** covered by §5805(6) like other professionals. They have their own special statute of limitations, §5839(1), to which reference is directed by §5805(14). The legislature has gone to some lengths to fashion a specific limitation period for architects that is different from other professionals.

A specific limitations statute controls over a general statute of limitations, *Hawkins v. Regional Medical Laboratories, P. C.*, 111 Mich App 651, 314 NW2d 450 (1979)

The Court of Appeals below cited the legislative history of sections 600.5805 and 5839 which was explored in *Michigan Millers Ins. Co. v. West Detroit Building Co., Inc.*, 196 Mich App 367, 494 NW2d 1 (1994). Courts may look to the legislative history of a statute to ascertain its meaning, *People v Hall*, 391 Mich 175, 215 NW2d 166 (1974) and *Luttrell v. Dept. of Corrections*, 421 Mich 93, 365 NW2d 74 (1984). In *Michigan Millers* the court looked at the Senate Fiscal Agency Analysis

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of Senate Bill 478, which is the bill that amended MCL 600.5805 by adding subsection (14) (Back then it was subsection 10). [Appendix 73b] The court stated that these were, "the only available documents that provide evidence of the Legislature's intent in amending §5805." 196 Mich App @ 375.

Not so. We also have in Appellees' Appendix, from the State of Michigan Archives, the minutes of the Senate Committee on Judiciary [64b] from October 15th, 1987 stating that Dennis Cawthorne, a representative of the State Society of Architects/Engineers, "... supported the bill and explained the purpose of this bill is to clarify the statutes of limitations, which is 6 years." (Emphasis supplied) Mike Crawford of the Construction Association of Michigan also, "... supported SB 478 and indicated the bill does not change policy, it clarifies it."

These statements acknowledging that the statute of limitations is 6 years were made on behalf of two of the same organizations which, as *amicus* briefers in this case, now urge a different statute of limitations!

From the same archives an actual tape of the hearing has been obtained and is included in appellees' Appendix [72b]. Everybody knew and understood that the purpose of the bill was to reverse the Court of Appeals holding in *Burrows v. Bildigare/Bublys, Inc.*, 158 Mich App 175, 404 NW2d 650 (1987)

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and to adopt the dissenting opinion of Judge T. M. Burns in that case. Judge Burns disagreed with the majority in *Burrows* and with the panel in *Marysville v. Pate, Hirn & Bogue, Inc.*, 154 Mich App 655, 397 NW2d 859 (1986). He opined that §5805(14) conjoined with §5839 to provide a 6-year statute of limitations for **all** claims of every kind against architects, professions engineers, surveyors and contractors. At the hearing, on the tape recording, it was commented that Judge Burns was a former legislator. [72b]

In the House of Representatives Committee on Judiciary the bill was reported out favorably and unanimously on March 15th, 1988. [78b] It was urged to do so by a letter from Dennis Cawthorne, Esq., of Fitzgerald, Hodgman, Cox, Cawthorne & McMahon dated March 19th, 1988. [82b] He had spoken in person to the Senate committee on behalf of the architects and engineers. In his letter to the House judiciary committee he indicates the understanding that the amendment is to clarify the original intent of §5839 that <u>all</u> suits against architects are subject to the time limits contained in MCLA 600.5839. He explained that this amendment was necessary because, in his view, two Court of Appeals decisions had, "...greatly muddied the waters..."

They received what they requested, a six-year statute of limitations; measured not from the date a cause of action

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accrues, but from the date a project is completed. Now they seek a second bite of the apple, an opportunity to muddy the waters again after the legislature has clearly written its fiat.

Many courts, and the Michigan Courts in particular, have repeatedly cautioned against judicial muddying of the statutory waters. This court is required to give effect to the Legislature's intent as expressed in the language of its statutes, if that language is unambiguous, "...as most such language is." *Garg, supra* at 472 Mich 281. It must presume the Legislature intended the meaning expressed. No further judicial construction is required, or even permitted. A statute must be enforced as written. *Garg, supra* at 281. In *Henry v The Dow Chemical Company*, 2005 MichLEXIS 1131 (July 13th, 2005) this court reiterated that it is the job of the Legislature, not the courts, to make social policy. Placing a premium on one societal interest at the expense of another, of identifying priorities and of choosing between competing alternatives is for the people's chosen representatives in the legislatures, not the courts.

It is rather odd to have a statute of limitations measured from the date of completion of a job instead of from the date of an injury or damage, but that is what the legislature did and it must have its reasons. Whatever they are, its will is

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manifest and must be applied by the court. In *O'Brien v Hazelet & Erdal, supra* this court held that it was both a statute of limitations and a statute of repose and that such a scheme was constitutional.

It should be noted that of the Court of Appeals decisions which appellant's *amici* blame for muddying the waters, three of them, neither the panel in *Marysville*, the majority in *Burrows*, nor the panel in *City of Midland v Helger Construction Co.*, 157 Mich App 736, 403 NW2d 218 (1987) mention anything about the legislative history of the statute or indicate any effort made to determine what the legislature really intended.

The statute requires that an action for personal injuries, such as this one, must be brought within 6 years after the time of occupancy of the completed improvement, use or acceptance of it.

Appellant here alleges that the project was completed in April 1998. Appellees of course would not know when the project was complete. We know from the records of the City of Warren [554a] that as of September 16, 1998 no Certificate of Occupancy had been filed with the city. Nonetheless, the building was partly occupied. We see from the cases, *Male v Mayotte, Crouse & D'Haene*, 163 Mich App 165, 413 NW2d 698 (1987) and *Midland, supra* that the best evidence of the date of completion is a document called the "Certificate of Substantial

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Completion" which is executed by the owner. No such certificate has been provided in this case, and indeed, during discovery review of the architect's files, no such certificate was produced. So there is no proof here as to precisely when, if ever, this project was completed. There is a dispute, but the appellant has the burden of proving by a preponderance of the evidence when the §600.5839(1) period of limitations is supposed to have commenced to run. *Travelers Insurance Co. v Detroit Edison,* 237 Mich App 485, 603 NW2d 317 (1999).

In a case like this, where the building was improved in phases and the entire project was not finished until after Jennifer Hudock sustained her injury, a fact question could arise as to when her claim became barred. But that is not an issue here, because, even if we use the date appellant urges, April 1998 when her job was transferred to the renovated part and that part of the building came to be in use; she filed her lawsuit on May 10th, 2000, which was 25 months after the Campbell-Ewald portion was occupied by it. This was well within the 6-year period of limitations.

We cannot assume that the Legislature engaged in futile law-making. We must assume that if the legislature had wanted the 2-year statute to apply to architects it would not have created sections 5839(1) and 5805(14). It has the responsibility to balance the needs to protect architects,

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engineers, surveyors and contractors from stale claims versus the right of the general public to rely on the competency of those persons to have made safe, sound and lasting improvements to real property. It has done so in unmistakable terms.

Consider the alternatives in the context of the scenario in the *Michigan Miller's* case. Suppose there had been customers in the Ping On Restaurant when the roof collapsed, almost 8 years after it was built, and had crushed them. If there had never been a section 5839(1) and section 5805(14), then the case of Mr. Kwok, the restauranteur, and his subrogee for architect malpractice would have been barred 2 years after the last professional service by the architect, (or perhaps 6 months from the date of the catastrophe if the defect only became discoverable at the time of the collapse); but the customers would have had 3 years from the date of their injuries to sue the architect. That would have been 11 years after the building was finished. In such circumstances the architect and his estate could be amenable to suits for injuries arising from badly designed buildings for many, many years, and would want to purchase insurance against such risk, if such insurance would be available.

But with section 5839(1) if the roof had collapsed after 1 year, Mr. Kwok and his customers would have 5 years in which to sue the architect and contractors. This is a very liberal

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margin. However, if the roof collapsed on the 2,190th day after the Certificate of Substantial Completion was issued, Mr. Kwok and his customers would have only one day (2 days in some years) in which to file suit. There is no 6-month-after-discovery margin in section 5839. Some customers might find their action barred before being released from the emergency room. This is a very harsh rule. But it is what the legislature wrote and what it intended,

By limiting the time in which **all** kinds of suits can be brought the Legislature expanded the time limit in which the owner can sue the architect, but curbed the ultimate temporal parameters during which he can be liable to the public. It made them the same, as to **all** suits. The architect need only bear, or insure against, the risk of collapse for 6 years. Then he is absolved. In exchange, he has the same 6-year exposure to suits from any and **all** claimants. This was the legislative intent. This was the clear understanding of the architects, engineers, and contractors who lobbied for the bill. If a Michigan architect and contractor can cobble together a ramshackle structure that will pass the building inspection and hang together for six years (without committing gross negligence) they are free and clear of all lawsuits by everyone. Up to that time they are amenable to suits by all who have claims that accrue anytime within that 6 years. The legislature and the

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regulated community agreed on this. And this was the holding of the Court of Appeals below.

The Court of Appeals did not commit any error. It applied the statutes as clearly written and followed the holding of this court in *O'Brien v. Hazelet & Erdal*.

III

IF NOT, THE THREE-YEAR GENERAL STATUTE, MCL 600.5805(10) RATHER THAN THE TWO-YEAR MALPRACTICE STATUTE, MCL 600.5805(6) IS APPLICABLE.

A. Standard of Review

Appellees agree with appellant that the standard of review is *de novo*.

B. If there were no section 5839 a three-year statute of limitations would apply to this case.

Defendant-Appellant argues that the decision of the court in this case is in conflict with the decision in *Witherspoon v. Guilford*, 203 Mich App 240, 511 NW2d 270 (1994). Indeed, the Court of Appeals admits that point, stating that it finds *Witherspoon* in conflict with other decisions of that court and is wrong. But the point is moot in this case because even if *Witherspoon* were to be the law, it holds that these plaintiffs have a 3-year period of limitations and they did file within that period.

The trial court erred because it applied the wrong limitations period to appellant's case even under *Witherspoon*.

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Even under the *Witherspoon* doctrine the statute of limitations which outlaws claims by a customer against his own architect would be two years; but that which bars tort claims by a third-party victim not in privity with the architect would be three years. As the judges in that court wrote, in interpreting the statutory sections in tandem:

> ...we do not understand those provisions to expand the general three-year period of viability of injury claims under §5805(8)[1] to a six-year period insofar as those claims apply to those protected by §5839. 203 Mich App at 247.

We are asked to assume a hypothetical situation in which the legislative mandate of MCL 600.5805(14) incorporating by reference MCL 600.5839 did not exist. In such a scenario MCL 600.5805(6) prescribes a 2-year period with, under MCL 600.5838(2), a 6-months-after-discovery proviso for actions charging malpractice. "Malpractice" cases originally could be brought only against members of the common-law professions; medicine, law and the clergy. *Kambas v St. Joseph Mercy Hospital,* 389 Mich 249, 205 NW2d 431 (1973). Maybe dentistry and architecture were included. The Legislature changed that by expanding the protection of malpractice to all members of any "state licensed profession," MCL 600.5838(1) This sweeps in a lot of people, as the state requires licenses for everybody from apiarists to zookeepers. Architects are included.

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1. Now §5805(10).

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If section 5805(6) applied here, that would require Mrs. Hudock to file her case within 2 years after the architect, "discontinues serving the plaintiff in a professional or psuedoprofessional capacity..." or within 6 months after she discovered or should have discovered the existence of her claim. MCL 600.5838(2). The difficulty is that appellant never commenced serving appellee Jennifer Hudock in a professional capacity, therefore never discontinued serving her.

Appellees had no knowledge that there could be culpability on the part of the architect until Denny's Heating, Cooling & Refrigeration filed a Notice of Possible Non-Party Fault on August 8, 2000, and appellant architect has presented no evidence otherwise. Appellant was added within 96 days after that, and the claim related back to May 10th, 2000 by virtue of MCL 600.2957(2), well within 2 years of the date the architect discontinued serving her and almost 3 months *before* she discovered or should have discovered the existence of the claim.

It is this concept of the professional architect having served her that makes the 2-year malpractice statute inapplicable. A cause of action for malpractice is by its very nature a claim by a client, patient or customer against the professional provider. There must be some kind of service rendered by the professional to the plaintiff.

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In *Dyer v Trachtman,* 470 Mich 45, 679 NW2d 311 (2004) this court looked at the relationship between a physician performing a medical examination of plaintiff on behalf of an adverse party in litigation. During the examination the doctor injured the patient. This court held that, although there was no doctor-patient relationship between them, there was a "limited patient-physician relationship with the examinee" that made the case one of malpractice rather than negligence.

Here there was no relationship at all between appellant and appellees. The architect never served, touched or talked to this occupant. His duty to her was not defined by any professional relationship, but by his common-law duty to exercise due care.

This argued conflict between the two statutory provisions was addressed by the Court of Appeals before *Witherspoon.* In *City of Midland v Helger Construction Co.*, 157 Mich App 644, 398 NW2d 481 (1987) and in *City of Marysville v Pate, Pirn & Bogue, Inc.*, 154 Mich App 655, 397 NW2d 859 (1986) *lv den* 428 Mich 855, it was held that the 2-year limitations period in MCL 600.5805(6)[2] applies to lawsuits between architects and owners, while §600.5839(1) applies to lawsuits by third parties against them. This makes good sense because an owner who hires an architect presumably is in a good position to know if

2. Cited as 5805(4) in the opinion. The subsections were renumbered in 2003.

ATTORNEY AND COUNSELOR AT LAW
2395 S. Huron Parkway, #200
Ann Arbor, Michigan 48104-5129

malpractice has been committed early on, while a third party, such as an invitee, passerby, etc., might not know the building is defective until after having been injured.

Defendant-appellant now relies on *Witherspoon v Gilford*, which, despite the longer limitation period in §600.5839(1), applied the general 3-year statute of limitation for personal injury claims against plaintiff Witherspoon, rather than the 6-year or 10-year limitation. In *Witherspoon* the plaintiff's decedent was killed on November 6, 1988 due in part to a defective guard rail completed in October 1988. The suit was filed three years and one day later, on November 7, 1991. Plaintiff argued that as to the contractor, the limitations period was 6 years after the rail was finished, i.e. until October 1994. The court of appeals said, "no," the special section 600.5839(1) does not extend the general statute.

Even so, *Witherspoon* destroys the Edward Schulak, Hobbs + Black, Inc. argument in this case because *Witherspoon* dumps MCL 600.5839(1) into MCL 600.5805(10), the 3-year general limitations statute, <u>not</u> into MCL 600.5805(6), the 2-year malpractice limitations statute. *Witherspoon* recognizes that a claim for personal injury accrues when all of the elements of the cause of action have occurred and can be alleged in a proper complaint, 203 Mich App @ 244. The architects and engineer's statute, §600.5839, it says, is a statute of repose

Professional Corporation
ATTORNEY AND COUNSELOR AT LAW
2395 S. Huron Parkway, #200
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which bars lawsuits by third parties against architects, engineers, builders, etc. more than 6 years after an improvement project is completed, 10 years if based upon gross negligence. But it does not extend the general statute.

For example: according to *Witherspoon* if a project were completed on Jan 1st, 2001 and a plaintiff was injured on January 1st, 2002, she would have 3 years, not 2, to file against the architect, engineer or builder, *i.e.* until January 1st, 2005. She would not get 6 years, until January 1st, 2008. But if she were injured on January 1st 2007, she would have to file by January 1st, 2008; she would not have her full three years from date of injury until January 1st 2010.

The impact of *Witherspoon* on the instant case lies in the holding of the Court of Appeals at 203 Mich App 247 that the plaintiff had <u>three years</u> in which to sue, under the general statute of limitations, not just the two years under the malpractice sub-section. This is consistent with the rulings in the *Midland* and *Marysville* cases above which hold that the 2-year statute only applies in cases between the architect and his/her customer.

In this case:

- Appellee Jennifer Hudock was sickened over a period of time, from April 27th, 1998 into mid-August 1998 when she was advised by her physician not to work there anymore.

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2395 S. Huron Parkway, #200
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The trial judge ruled her cause of action accrued, "..in mid-August 1998". There is no contest as to this.

- She learned of the possible involvement of defendant Edward Schulak, Hobbs + Black, Inc. on August 8th, 2000 upon receiving Denny's Notice of Possible Non-Party Fault.
- Plaintiffs filed a Motion to add Edward Schulak Hobbs + Black, Inc. 51 days later, well within 91 days after receiving this notice as specified in MCL 600.2957(2). The 91-day time limit under MCR 2.112(K)(3)(d) was tolled until the motions to strike the Notice and, alternatively to amend the Complaint, were decided.
- Appellees filed their First Amended Complaint naming Edward Schulak, Hobbs + Black, Inc. on November 10th, 2000.

Under MCL 600.2957(2) the filing of the Amended Complaint against the non-party at fault related back to the original date of the filing of the first Complaint, thus, as a matter of law the Amended Complaint naming defendant-appellant is deemed to have been filed on May 10th, 2000. This is well within the 3-years period of limitations that would be applied even under the *Witherspoon* rule. It is 1 year 9 months after the date the trial judge held her cause of action accrued. It is 3 months *before* she discovered or should have discovered she had a claim against the appellant.

ATTORNEY AND COUNSELOR AT LAW
2395 S. Huron Parkway, #200
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Even without the aid of MCL 600.2957(2) the First Amended Complaint filed November 14th, 2000 was filed well within three years of the occupancy of the Campbell-Ewald suite in April 1998. This First Amended Complaint filing was 96 days after the Notice of Non-Party Fault, 2 years and 6½ months after she started working in the building and 2 years 3 months after her injuries culminated in inability to continue working there. According to *Witherspoon* she had until August 24th 2001 to sue Edward Schulak, Hobbs + Black, Inc.

No statute of limitations bars the claims. The trial Judge, on page 7 of his Opinion and Order, cites *Witherspoon* and *Marysville* but says that appellees had only two years in which to file their action against appellant. This is a total misreading of the holdings in both of those cases. Even according to appellant's theory the trial judge would only be correct if the building owner (Warren Regency in this case) who hired the architect were the plaintiff. But he would be in error when the plaintiff is a third party not in privity with the architect.

With or without *Witherspoon* plaintiffs' claims against the appellant were NOT barred when filed. Therefore it is futile to debate whether or *Witherspoon* should be the law when the result must be remand this case to the trial court under either theory.

ATTORNEY AND COUNSELOR AT LAW
2395 S. Huron Parkway, #200
Ann Arbor, Michigan 48104-5129

RELIEF REQUESTED

Appellants request that this court affirm the decision of the Court of Appeals and remand this case to the circuit court for trial as to defendant-appellant Edward Schulak Hobbs + Back, Inc., with costs.

Respectfully submitted;

DONNELLY W. HADDEN, P.C.

By: _____
Donnelly W. Hadden (P14507)
Attorney for Appellants
2395 S. Huron Parkway, #200
Ann Arbor, MI 48104-5129
(734) 477-7744

BALL & BALL, LLP

By: _____
Bettie K. Ball (P49431)
Co-Counsel for Appellants
20 S. Main St., Suite 112
Mt. Clemens, MI 48043-2370
(586) 468-9850

Dated: August 18, 2005

Donnelly W. Hadden
Professional Corporation
ATTORNEY AND COUNSELOR AT LAW
2395 S. Huron Parkway, #200
Ann Arbor, Michigan 48104-5129